Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
1998 Biennial Regulatory Review -	)	CC Docket No. 98-171
Streamlined Contributor Reporting	)	
Requirements Associated with	)	
Administration of Telecommunications	)	
Relay Service, North American Numbering	)	
Plan, Local Number Portability, and	)	
Universal Service Support Mechanisms	)	
	)	
Telecommunications Services for	)	CC Docket No. 90-571
Individuals with Hearing and Speech	)	
Disabilities, and the Americans with	)	
Disabilities Act of 1990	)	
	)	
Administration of the North American	)	CC Docket No. 92-237
Numbering Plan and North American	)	NSD File No. L-00-72
Numbering Plan Cost Recovery	)	
Contribution Factor and Fund Size	)	
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

Comments of TCA

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I. Introduction

TCA, Inc. - Telcom Consulting Associates ("TCA") hereby submits these comments in response to the Public Notice issued in the proceedings as captioned above.

On December 12, 2002, the Commission released an Order modifying the current revenue-based universal service contribution methodology.[1] The Commission clearly stated that the modifications were interim in nature "to maintain the viability of universal service in the near term…"[2] One of the modifications increased the interim safe harbor[3] for wireless carriers to 28.5 percent.[4] Additionally, mobile providers were still afforded the option of reporting actual interstate revenues.[5] On its own motion, the FCC released, January 30, 2003, an Order on Reconsideration clarifying "options for recovery of universal service contribution costs by wireless telecommunications providers…"[6] AT&T Corporation filed a Petition for Reconsideration March 13, 2003.[7] TCA supports AT&T's Petition and respectfully requests that the Commission rescind its Reconsideration Order.

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[1] *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171,90-571,92-237, 99-200, 95-116, 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (2002) (Interim USF Order).

[2] *See Interim USF Order* at para. 1.

[3] The interim safe harbor, first established by the Commission in 1998 at 15 percent, is an alternative for wireless carriers to reporting actual interstate revenues upon which to base USF contributions.

[4] *See Interim USF Order* at para. 21.

[5] *Id*. at para. 24.

[6] *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171,90-571,92-237, 99-200, 95-116, 98-170, Order and Order on Reconsideration, FCC 03-20 (2003) (Reconsideration Order) at para. 1.

[7] *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171,90-571,92-237, 99-200, 95-116, 98-170, AT&T Petition for Reconsideration (filed March 13, 2003) (AT&T Petition).

TCA is a management consulting firm providing financial, regulatory, management and marketing services for over fifty small, rural local exchange carriers ("LECs") throughout the United States. TCA's clients, mainly providers of wireline service including interstate services, contribute to the federal universal service support mechanisms and therefore will be directly impacted by the FCC's actions in this proceeding. These comments address the concerns of TCA's clients.

II. The Reconsideration Order violates two principles upon which the Commission is legally mandated to base universal service policies.

The Telecommunications Act of 1996 (the Act) established six specific principles upon which the Commission is required to base policies for the preservation and advancement of universal service.[8] Equitable and nondiscriminatory contributions, specifically defined in the Act as, "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service,"[9] is one of these explicit principles. Additionally, the Commission adopted the principle of competitive neutrality, defining it as:

> Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.[10]

The Reconsideration Order, as it essentially retains the status quo for wireless carriers, while mandating a prohibition for all other carriers, violates these two principles –equitable and nondiscriminatory contribution and competitive neutrality.

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[8] 47 U.S.C. §254 (b).
[9] *Id*.
[10] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8802, para. 47 (1997), as corrected *by Federal-State Joint Board on Universal Service*, Erratum, CC Docket No. 96-45, FCC 97-157 (re;. June 4, 1997), and Erratum, 13 FCC Rcd 24493 (1997), *aff'd in part, rev'd in part, remanded*

The Interim USF Order unambiguously prohibits any mark-up of recovery of USF contribution costs when a carrier utilizes a separate line item. "[C]arriers that elect to recover their contribution costs through a separate line item **may not** mark up the line item above the relevant contribution factor."[11] The Order does note the unique position that some wireless carriers claim – that is it difficult to measure interstate revenues on an individual customer basis – and provides an exemption from this prohibition in Footnote 131. Footnote 131 reads, in part:

> For CMRS providers, the portion of the total bill that is deemed interstate will depend on whether the carrier reports actual revenues or utilizes the safe harbor. For wireless telecommunications providers that avail themselves of the interim safe harbors, the interstate telecommunications portion of the bill would equal the relevant safe harbor percentage times the total amount of telecommunications charges on the bill.[12]

Footnote 131 is quite clear. The exemption from the averaging prohibition only applies when a wireless carrier avails itself of the safe harbor. The Order also states that any contributing carrier may still "recover their contribution costs through their end-user rates if they so choose…"[13]

Therefore, at the release of the Interim USF Order, a wireless carrier had three alternatives by which to recover universal service contribution costs. One of these alternatives, the safe harbor option, specifically exempted wireless carriers from the prohibition of averaging such costs.

Footnote 131 of the Interim USF Order plays a leading role in the Reconsideration Order, in that it is this Footnote the Commission seeks to clarify. The Order notes two different interpretations of the prohibition against mark-up regarding wireless carriers, set out in two *ex parte* filings – one filed by the Cellular Telecommunications & Internet Association (CTIA) and the other jointly filed by AT&T and WorldCom.[14] The Order then sides with the CTIA Ex Parte, allowing

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in part sub nom, *Texas Office of Public Utility Counsel v. FCC*, 183 F. 3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000) (USF Order).

[11] *See Interim USF Order* at para. 51(emphasis added).

[12] *Id.*

[13] *See Interim USF Order* at para.40.

[14] *See* Letter from Michael Altschul, Cellular Telecommunications & Internet Association, to Marlene H. Dortch, Federal Communications Commission, filed January 16, 2003 (CTIA *Ex Parte*), and Letter from Robert W. Quinn,

wireless carriers utilizing a traffic study to average its USF contribution costs across its subscriber base. "The interstate telecommunications portion of each customer's bill would equal the company-specific percentage based on its traffic study times the total telecommunications charges on the bill."[15] By allowing the averaging of interstate revenue across a wireless carrier's customer base through the use of a traffic study, the Commission violates the principle of competitive neutrality. The Commission clearly favors wireless technology and by allowing this proxy, in lieu of **actual** interstate revenues, advantages the wireless carriers over all other contributors to the federal universal service mechanisms.

As the Commission notes in the Universal Service Order, "it would be extremely difficult to achieve strict competitive neutrality."[16] However, a reading that the prohibition against averaging is also applicable to wireless carriers (when not employing the safe harbor option) is not a strict reading. Indeed, the Commission exempted the wireless carriers by continuing to allow the safe harbor and the inherent averaging therein.[17]

In the Universal Service Order, the Commission continued by stating that competitively neutral rules ensure that "…no entity receives an unfair competitive advantage that may skew the marketplace…"[18] By allowing wireless carriers utilizing traffic studies to determine averaged interstate revenue to further average their USF contributions, which most likely will result in a much lower federal USF charge on a wireless subscriber's bill, the Reconsideration Order significantly benefits the wireless industry. In turn, the Order completely upends the principles of competitive neutrality and equitable and nondiscriminatory contribution.

AT&T and Richard Whitt, WorldCom, to Marlene H. Dortch, Federal Communications Commission, filed January 24, 2003.

[15] *See Reconsideration Order* at para. 8 (footnote omitted).

[16] *See Universal Service Order* at para. 48.

[17] *See Interim USF Order* at Footnote 131.

[18] *See Universal Service Order* at para. 48.

III. The Reconsideration Order ignores evidence within the record of the instant Proceeding.

As noted earlier, the Reconsideration Order sides with CTIA after considering two differing *ex parte* filings. The CTIA *Ex Parte* states that the exemption from the averaging prohibition should be extended, in part, because:

- There was no evidence in the record that **any** wireless carrier could measure interstate revenues for contribution purposes other than through aggregated traffic studies.
- There was no evidence in the record that carriers could determine the proportion of interstate traffic on a customer-specific basis to recover contribution costs from customers.[19]

The Reconsideration Order clearly relies on the CTIA *Ex Parte*, stating "[b]ecause we recognize that some CMRS providers…may not have the capability to determine their interstate telecommunications revenues on a customer-by-customer basis, we will allow CMRS providers to report their interstate telecommunications revenues based on a company-specific traffic study."[20] However, by relying on the CTIA *Ex Parte*, the Reconsideration Order ignores both the Interim USF Order it seeks to clarify and previous evidence within the proceedings.

The Interim USF Order increased the safe harbor used by wireless carriers, based in part on a previous *ex parte* filing by CTIA.[21] In the CTIA Traffic Study *Ex Parte*, the methodology for the study attributed to TracFone Wireless, Inc. (TracFone) states that TracFone analyzed billing records. "These invoices contained call record detail that identified the originating cell site and the terminating location (using the area code)."[22]

The Interim USF Order also released a *Second Further Notice of Proposed Rulemaking* where the Commission requests comments on whether the wireless safe harbor should be completely

[19] *See CTIA Ex Parte* at p. 4 (emphasis added).
[20] *See Reconsideration Order* at para. 8.
[21] *See Interim USF Order* at para. 21, referencing Letter from Michael Altschul, Cellular Telecommunications & Internet Association, to Marlene H. Dortch, Federal Communications Commission, filed September 30, 2002 (CTIA Traffic Study *Ex Parte*)
[22] CTIA Traffic Study *Ex Parte* at p. 3, footnote 1.

abolished, and if, so, how wireless carriers should determine actual interstate revenues.[23] In making this request, the Commission notes previous contentions made to the Commission stating that is possible to determine "actual interstate end-user telecommunications revenues" regarding wireless traffic, including claims made by TracFone and Verizon Wireless.[24]

Prior to the release of the Reconsideration Order on January 30, 2003 and the Interim USF Order on December 13, 2002, there was indeed proof within the record of this current proceeding that wireless carriers have access to data, which in a large majority of cases, can determine interstate revenue on a customer-specific basis. In response to questions from Commission staff, TracFone filed an *ex parte* letter October 4, 2002 stating that using call detail information, it could "identify which of its traffic is interstate…"[25] On a page entitled "Wireless Safe Harbor Is Not Necessary," TracFone states that "[w]ireless carriers have originating (by cell site) and terminating locations and often show that information on bills. **In the vast majority of cases**, this information can be used to determine which calls are interstate."[26] In an October 31, 2002 meeting with Commission staff, TracFone "reiterated its view that wireless carriers have the capability of identifying interstate calls and determining actual interstate revenues."[27] Finally, in a letter to the Commission filed December 5, 2002, TracFone parenthetically states that "it has demonstrated repeatedly that wireless carriers can – **and do**—identify the originating and terminating locations of calls on invoices sent to their customers…"[28]

The Reconsideration Order, which is partially based on *ex parte* filings, improperly ignores clear proof that some (if not most) wireless carriers can determine actual interstate revenue on a customer-by-customer basis. Therefore, allowing a wireless carrier to average USF contributions based on a traffic study, when actual interstate revenues can apparently be

[23] *See Interim USF Order* at para. 68.
[24] *Id. See also Id*. at Footnote 152.
[25] *See* Letter from Mitchell Brecher, counsel for TracFone Wireless, Inc., to Marlene H. Dortch, Federal Communications Commission, filed October 4, 2002 at p. 2.
[26] *See* Letter from Mitchell Brecher, counsel for TracFone Wireless, Inc., to Marlene H. Dortch, Federal Communications Commission, filed October 25, 2002 at p. 3 (emphasis added).
[27] *See* Letter from Mitchell Brecher, counsel for TracFone Wireless, Inc., to Marlene H. Dortch, Federal Communications Commission, filed November 1, 2002 at p. 1.
[28] *See* Letter from Mitchell Brecher, counsel for TracFone Wireless, Inc., to Marlene H. Dortch, Federal Communications Commission, filed December 5, 2002 at p. 2 (emphasis added).

submitted and the USF charge could be applied on a customer-specific basis, flies in the face of equitable and nondiscriminatory contributions.

IV. Conclusion

In a separate statement to the Interim USF Order, Chairman Powell notes that "[f]ailure to engage in reform may jeopardize the stability and sufficiency of the fund and impose unfair burdens on certain classes of carriers and their customers."[29] While the modifications stated in the Interim USF Order and unlawfully extended in the Reconsideration Order are meant to be temporary, the impact of this extension on the principles of universal service will be permanent. In order to protect the principles and alleviate the burden placed on wireline carriers and their customers, the Commission should rescind the Reconsideration Order and allow the clear language of the Interim USF Order to stand.

Respectfully submitted,

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[29] *See Interim USF Order*, Separate Statement of Chairman Michael K. Powell at p. 92.